

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE CITY OF BLOOMINGTON

In the Matter of TBI Liquor One,
Incorporated, d/b/a Cheers Wine & Spirits

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER**

On May 30, 2013, this matter came before Administrative Law Judge Eric L. Lipman for an evidentiary hearing. The hearing record closed at the conclusion of the hearing on that day.

Ann Kaul, Assistant City Attorney, appeared on behalf of the City of Bloomington. Matthew M. Johnson, Erickson, Zierke, Kuderer & Madsen, P.A., appeared on behalf of the Licensee, TBI Liquor One, Incorporated, d/b/a Cheers Wine & Spirits (Cheers).

STATEMENT OF THE ISSUES

1. Was D.J. Schubert “obviously intoxicated” when she purchased beer at the Licensee’s store on August 18, 2012?
2. Did this sale violate Section 13.52 (a) of the Bloomington City Code?

SUMMARY OF CONCLUSIONS

The Administrative Law Judge concludes that Ms. Schubert did not display obvious signs of intoxication prior to her purchase of beer on August 18, 2012, and Cheers’ sales staff could not reasonably have been aware of her intoxication prior to that sale. The Administrative Law Judge dismisses the citation pursuant to Bloomington City Code § 1.17 (g).

Based upon the hearing record, the ALJ makes the following:

FINDINGS OF FACT

1. Cheers holds a license from the City of Bloomington to operate an off-sale retail store for the sale of intoxicating liquors. It operates such a store from within a shopping center at 9340 Ensign Avenue South in the City of Bloomington.¹

¹ Notice and Order for Hearing, at 2.

2. On Saturday, August 18, 2012, at approximately 10:30 a.m., D.J. Schubert went to Cheers to purchase some beer. Ms. Schubert is an occasional customer of Cheers and is someone whom the employees recognized when she arrived at the store that morning.²

3. Ms. Schubert made her way to the store's refrigerated cabinets and tried to remove a 24-pack of Miller Lite beer. Because Ms. Schubert has a slight frame, and was walking with a stoop on that day, Nicholas Hargrove, a store clerk, offered his assistance. As Mr. Hargrove withdrew the package of beer from the refrigerated cabinet, Ms. Schubert mentioned that she was suffering from back pain.³

4. Cheers employees are instructed to engage customers in conversation while facilitating sales. The requirement has two key purposes: Conversation with patrons is a method by which the sales clerks can assure themselves that would-be purchasers of alcohol are not impaired. Additionally, light conversation provides the sales force with opportunities to establish rapport with customers, learn about customers' preferences and build customer loyalty.⁴

5. While engaged in conversation with Ms. Schubert, Mr. Hargrove did not notice anything peculiar about the substance or manner of Ms. Schubert's speech. He believed her to be in some pain, but not impaired in any other way.⁵

6. To assist Ms. Schubert, Mr. Hargrove brought the 24-pack of beer that he retrieved from the refrigerated cabinet to a sales counter at the front of the store. He placed the pack down at a counter where Assistant Manager Jeffrey Carrane was operating the cash register.⁶

7. Mr. Carrane similarly engaged Ms. Schubert in conversation as she approached the sales counter. Ms. Schubert inquired as to whether the store carried another brand of beer, which she preferred more to Miller Lite, but the hoped-for brand was not one that Cheers sold.⁷

8. Mr. Carrane did not notice anything unusual about Ms. Schubert's deportment, other than she had a slow, stooping gait. Schubert's walking did not appear to be unbalanced nor did she have slurred or halting speech when she spoke to Mr. Carrane.⁸

² Exhibits 1, 2, 5, 6 and 8; Testimony of Nicholas Hargrove; Testimony of Jeffrey Carrane.

³ Test. of N. Hargrove.

⁴ Ex. 7; Test. of N. Hargrove; Test. of J. Carrane.

⁵ Test. of N. Hargrove

⁶ Test. of N. Hargrove; Test. of J. Carrane.

⁷ Test. of J. Carrane.

⁸ *Id.*

9. A few moments after the sale was completed, Ms. Schubert, who was nearly to the exit of the store with her purchase, fell down. Mr. Hargrove was the first to notice that Ms. Schubert had fallen to the showroom floor. As he made his way to assist her, Mr. Hargrove called out to Mr. Carrane, urging him to telephone 911.⁹

10. An angry and discomfited Ms. Schubert declined any assistance from Mr. Hargrove. Schubert became combative, rebuffing Hargrove's efforts to assist her to her feet. Ms. Schubert did make it to her feet again, and exited the store, while Mr. Carrane was still describing the scene to the 911 dispatcher.¹⁰

11. A few steps outside of the store, on the sidewalk adjacent to the showroom window, Schubert fell again.¹¹

12. Two passersby witnessed Ms. Schubert's second fall and alerted Officer Douglas Barland of the Bloomington Police Department. Officer Barland was in a parked patrol car, a short distance away from Cheers' storefront, when he received these reports of a woman in distress outside of Cheers. Officer Barland started his patrol car and made his way across the shopping center parking lot.¹²

13. When Officer Barland activates the emergency lights on his squad car, the video camera system in the patrol car begins recording. The camera system records detail from the driver's seat towards the front of the car. On that day, the system recorded Barland's approach to Cheers' storefront.¹³

14. By the time Barland's squad car came to a stop in front of the liquor store, Ms. Schubert had righted herself a third time, but was struggling to maneuver with the 24-pack of beer. Her attempt to make her way down the sidewalk failed dramatically as an unbalanced Ms. Schubert toppled backward, hitting her head on the bumper of Barland's squad car.¹⁴

15. After radioing for medical assistance, Officer Barland attempted to engage Ms. Schubert as to her injuries. Ms. Schubert responded belligerently and incoherently to Barland's inquiries. Leaning closely over her in an effort to better understand her replies, Officer Barland smelled a strong odor of alcohol on Ms. Schubert's breath.¹⁵

⁹ Test. of N. Hargrove; Test. of J. Carrane.

¹⁰ *Id.*

¹¹ Test. of N. Hargrove.

¹² Exs. 1 and 2; Testimony of Douglas Barland.

¹³ Ex. 9; Test. of D. Barland,

¹⁴ *Id.*

¹⁵ *Id.*

16. A preliminary breathalyzer test conducted on Ms. Schubert by Officer Barland rendered a reading of .24 blood alcohol level.¹⁶

17. After emergency medical personnel arrived at the scene and were attending to Ms. Schubert, Officer Barland asked the Cheers' sales staff to accept a return of the beer and to refund Ms. Schubert's purchase. The staff promptly accepted return of the beer and refunded the purchase price. Ms. Schubert received the refund before she left the scene in an ambulance.¹⁷

18. Because Ms. Schubert refused to receive any medical treatment, over her objection, Officer Barland applied for an Emergency Admission to Fairview Southdale Hospital under Minn. Stat. § 253B.05, subd. 2.¹⁸

19. Based upon the report of Officer Barland, the City of Bloomington issued Notice of an Alcoholic Beverage License Violation.¹⁹

20. Cheers disputed that a violation occurred and submitted a timely request for a hearing. This contested case followed.²⁰

CONCLUSIONS

1. The Administrative Law Judge is authorized to hear this matter pursuant to Minn. Stat. § 14.50 and Bloomington City Code § 1.17 (b).

2. Cheers received proper notice of the claimed violation and of these proceedings.

3. At the evidentiary hearing, the City had the burden of proving that Ms. Schubert was obviously intoxicated at the time that she undertook purchase of beer on August 18, 2012.²¹

4. Under Bloomington City Code § 13.01.01, "malt beverages containing more than 3.2 percent of alcohol by weight" are intoxicating liquor.²²

5. The City did not meet its burden of proving that Ms. Schubert was obviously intoxicated when she purchased beer on August 18, 2012.

¹⁶ Ex. 3; Test. of D. Barland.

¹⁷ Ex. 2; Test. of D. Barland.

¹⁸ Exs 2 and 3; Test. of D. Barland.

¹⁹ Notice and Order for Hearing at 1.

²⁰ *Id.*

²¹ Minn. R. 1400.7300, subp. 5; Bloomington City Code § 1.17.

²² Bloomington City Code § 1.17.

6. The City did not establish that Cheers' sales staff knew, or that a reasonable sales clerk would know, that Ms. Schubert was intoxicated when she purchased beer on August 18, 2012.

7. Bloomington City Code § 1.17 (g) provides that the Administrative Law Judge may "dismiss the administrative citation ... based upon a finding that the City failed to provide sufficient evidence to prove the violation or charge...."

Based upon the foregoing Conclusions, and for the reasons set out in the Memorandum that follows below, the Administrative Law Judge makes the following:

ORDER

IT IS ORDERED THAT:

1. The City's Alcoholic Beverage License Violation is **DISMISSED**.
2. Pursuant to Bloomington City Code Section. 1.17 (k), the cost of the hearing shall be apportioned equally between Cheers and the City of Bloomington.

Dated: July 15, 2013.

____s/Eric L. Lipman_____
ERIC L. LIPMAN
Administrative Law Judge

Reported: Digitally recorded
No transcript prepared

NOTICE

Any person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63 to 14.69.

MEMORANDUM

In some respects, this dispute was unavoidable.

From the City's perspective, what it knows about this case it learned first and indelibly from the patrol car recording. The videotape shows Ms. Schubert as she struggles to walk home from a liquor store, and, clutching a case of cold beer, falling backward into a parked squad car. It is a jarring and troubling scene. The natural inference from the videotape is that because Ms. Schubert was so compromised when she was outside of the store, she must have also displayed the same signs of intoxication a few minutes earlier, while purchasing beer.

Yet, the hearing record does not bear out this view. There is no evidence of pre-sale conduct that would have alerted staff to Schubert's high blood alcohol level. Further, all of the evidence in the record points to the fact that Cheers' staff is thoroughly trained and earnestly works to prevent sales to intoxicated persons. In this record, there are simply no signs of either Cheers' negligence or ambivalence when making liquor sales to the public.

The far better reading of the record is that when Ms. Schubert fell the first time – a point after she had purchased the 24-pack of beer – the trauma of the fall was significant. Disoriented and in pain, she could no longer mask her intoxication, and the second and third falls outside of the store quickly followed.

Because the evidence in the hearing record points to the fact that Cheers' staff did not know, and did not have reason to know that Ms. Schubert was intoxicated, when they sold the beer, dismissal of the citation is the appropriate result.

E. L. L.